UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re CUSTOMS AND TAX ADMINISTRATION OF THE KINGDOM OF DENMARK (SKATTEFORVALTNINGEN) TAX REFUND SCHEME LITIGATION This document relates to 1:18-CV-05053-LAK.	MASTER DOCKET No. 1-18-MD-02865-LAK

DEFENDANTS–COUNTERCLAIM PLAINTIFFS–THIRD-PARTY PLAINTIFFS THE GOLDSTEIN LAW GROUP PC 401(K) PROFIT SHARING PLAN'S AND SHELDON GOLDSTEIN'S OPPOSITION TO THIRD-PARTY DEFENDANT ED&F MAN CAPITAL MARKETS, LTD.'S MOTION TO DISMISS THE THIRD-PARTY COMPLAINT PURSUANT TO RULE 12(b)(2) OR FOR *FORUM NON CONVENIENS* OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS AGAINST IT

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Defendants–Counterclaim Plaintiffs–Third-Party Plaintiffs The Goldstein Law Group PC 401(K) Profit-Sharing Plan and Sheldon Goldstein respectfully submit this memorandum in opposition to Third-Party Defendant ED&F Man Capital Markets, Ltd.'s Motion to Dismiss the Third-Party Complaint Pursuant to Rule 12(b)(2) or for *Forum Non Conveniens* or in the Alternative to Stay All Proceedings Against It (the "Motion").

PRELIMINARY STATEMENT

Third-Party Defendant ED&F Man Capital Markets, Ltd. ("MCM Ltd.") is wholly-owned by global commodities trader ED&F Man Holdings Limited ("ED&F Man"). It also is the flagship entity of ED&F Man's global brokerage brand, ED&F Man Capital Markets ("EDFMCM"), which boasts $8.1 billion in annual revenue and $14.2 billion in assets. MCM Ltd. seeks out and serves wealthy and institutional clients across the world, touting its unparalleled access to securities exchanges in Manhattan and beyond.

The Goldstein Law Group PC 401(K) Profit-Sharing Plan (the "Goldstein Plan" or the "Plan") was just one of those clients. Throughout 2014 and 2015, MCM Ltd.'s Equity Finance desk solicited and sold to the Manhattan-based Plan "customized equity finance solutions" whereby MCM Ltd. structured and facilitated the Plan's tax-favored acquisition of Danish dividends by finding and funding the Plan's Danish securities transactions.

But MCM Ltd. neglected to mention that many, if not all, of the Plan's acquisitions were funded by MCM Ltd.'s very own affiliate, Volcafe Ltd. ("Volcafe"). MCM Ltd. induced the Plan to trade Danish securities so that MCM Ltd. could earn significant fees—and its affiliate charge materially above-market interest rates.

While MCM Ltd. deliberately targeted New York customers and markets, it now moves to dismiss the third-party complaint filed by the Plan and its only participant, Sheldon Goldstein (collectively, the "Goldstein Parties"), claiming that it is not subject to New York's jurisdiction and that defending a case in this Court—located within two miles of at least three data centers MCM Ltd. owns and operates—would just be too inconvenient.

MCM Ltd.'s attempt to beg out of personal jurisdiction is pure folly. This Court should reject MCM Ltd.'s distorted positions and deny the Motion in its entirety.

BACKGROUND

ED&F Man Capital Markets, Ltd. is the Linchpin of a Global Brokerage Brand

EDFMCM advertises itself as a global financial brokerage that provides specialized securities lending and financing services, clearing and settlement for equities and fixed-income securities, and custodian services for exchange-traded and over-the-counter transactions, with offices in Campinas, Brazil; Chicago; Dubai; Hamburg; Hong Kong; London; Miami; New York; Rosario, Argentina; and Winterthur, Switzerland. TPC ¶ 7; ED&F Man Capital Markets, Global Presence, edfmancapital.com/global-presence ("Global Presence"). Although multiple entities comprise the group, EDFMCM holds itself out as a unified brand with a combined $8.1 billion in annual revenue and $14.2 billion in assets. TPC ¶ 8; ED&F Man Capital Markets, About Us, edfmancapital.com/about-us/ ("About Us").

All EDFMCM entities are wholly-owned by ED&F Man, a 236-year-old agricultural commodity trading group that boasts "7,000 people in 60 countries," TPC ¶

8; ED&F Man, Home, www.edfman.com. Two of those entities are based in New York City: ED&F Man Capital Markets Inc., regulated by the Securities & Exchange Commission (the "SEC"), the Financial Industry Regulatory Authority ("FINRA"), the Commodity Futures Trading Commission ("CFTC"), and the National Futures Association ("NFA"); and ED&F Man Derivative Products Inc., regulated by the CFTC and the NFA. ED&F Man Capital Markets, Corporate Info, edfmancapital.com/corporate-info.

EDFMCM represents that its primary office is at 3 London Bridge Street, London, SE1 9SG, Great Britain. See Global Presence. Both ED&F Man and Third-Party Defendant MCM Ltd. also are headquartered at 3 London Bridge Street. ED&F Man Capital Markets, Company Information, edfman.com/company-information ("Company Information"); TPC ¶ 6.

Among other services, MCM Ltd. provides "customized equity finance solutions," including clearing and prime brokerage services, to "broker–dealers, market-makers, hedge funds, family offices, and other institutional investors." ED&F Man Capital Markets, Products & Services, edfmancapital.com/products-services/ ("Products & Services").

ED&F Man also owns Switzerland-based Volcafe Ltd. ("Volcafe"), a coffee trader that purports to provide coffee beans for 50 billion cups of coffee per year. ED&F Man, Volcafe: The World's Best Coffee Partner, edfman.com/commodities/coffee. Volcafe has an American affiliate headquartered in Irvington, New York. Volcafe Specialty Coffee, Home, volcafespecialty.com

ED&F Man Capital Markets, Ltd.'s Existence Depends on Access to New York and its Markets

Like ED&F Man and Volcafe, EDMCM advertises that it is a "truly global enterprise" whose "market-leading brokers offer a 24-hour global integrated service for voice and electronic trading support and extensive market access solutions." Products & Services. EDFMCM advertises that it has co-location facilities with financial exchanges and "Tier 1 data center facilities in proximity to key financial exchanges," including the New York Mercantile Exchange ("NYMEX"), located at One North End Avenue in Brookfield Place, Manhattan; the Intercontinental Exchange ("ICE"), located at 11 Wall Street, Manhattan; and BrokerTec, located at 11 West 42nd Street, Manhattan. ED&F Man Capital Markets, Infrastructure & Technology, edfmancapital.com/infrastructure-technology ("Infrastructure & Technology"). MCM Ltd. also shares services and personnel with its U.S. affiliates, including ED&F Man-hosted trading platforms and physical data centers located in Illinois, New Jersey, and the United Kingdom. CME Group, ED&F Man Capital Markets, www.cmegroup.com/partner-services/ed-and-f-man-capital-markets.html.

EDFMCM's website further emphasizes that it "provide[s] clients with screens to route orders across all US equity and options markets." Products & Services. The website does not single out or otherwise advertise EDFMCM's capabilities in any other specific jurisdictions. See generally ED&F Man Capital Markets, edfmancapital.com.

ED&F Man Capital Markets, Ltd. Targeted American Pensioners in Order to Take Advantage of the Double-Taxation Treaty

From 2012 to 2015, MCM Ltd. traded Danish securities for the benefit of at least 36 American pension plans, including the Goldstein Plan, and created 420 tax vouchers for those plans' submission to SKAT (the "Danish Dividend Transactions"). TPC ¶ 34. SKAT has alleged that MCM Ltd. was the broker and created vouchers for at least 47 defendants named in 30 separate lawsuits that have been consolidated into this MDL. Declaration of Kari Parks ¶ 6 (Aug. 30, 2019) ("Parks Decl.") Two of those pension plan defendants are alleged to be in New York; three are alleged to be in New Jersey; and two are alleged to be in Connecticut. Id. ¶ 7.

Both SKAT and the Goldstein Parties have alleged that due to the Double-Taxation Treaty, the dividend reclaim application transactions at issue could **only** have occurred where their owners were United States pension plans. See TPC ¶¶ 21, 65–68. In fact, MCM Ltd.'s Equity Finance desk solicited and sold these "customized equity finance solutions" to the Plan throughout 2014 and 2015. Parks Decl. ¶¶ 8–9.

Throughout 2014 and 2015, the seasonal nature of the coffee business caused Volcafe to periodically have large cash reserves necessary to purchase raw coffee beans at a later date. Parks Decl. ¶ 14. Meanwhile, general market rates were exceptionally low; for example, the 2014 average of three-month USD LIBOR was .234%, while the 2015 average was .316%. Id. ¶¶ 18, 19. Conversely, the 2006 average of the three-month USD LIBOR was 5.198%, and the 2018 average was 2.307%. Id. ¶¶ 17, 20.

Eager to put Volcafe's cash to better use, ED&F Man, MCM Ltd., and Volcafe devised, structured, and sold the Danish Dividend Transactions to MCM Ltd.'s U.S. pension plan clients, including the Plan. Id. ¶¶ 9, 15. By this self-dealing, MCM Ltd. extracted materially higher fees from its American pension plan clients than what would otherwise have been possible or commercially-reasonable under prevailing market conditions and interest rates. Id. ¶¶ 15, 22. This undisclosed inter-company affiliate funding catalyzed MCM Ltd.'s solicitation of U.S. pension plans, including the Goldstein Plan, to transact in Danish securities. Id.

MCM Ltd. arranged and executed the securities transactions relevant to all nine of the Plan's Reclaim Applications. Parks Decl. ¶ 9; Amended Answer of Goldstein Defendants ¶ 90 (Apr. 23, 2019) ("Amended Answer"). At least four of those applications related to Danish securities that the Plan bought after being solicited by MCM Ltd. Equity Finance Trader Oliver Bottomley, among others: D/S Norden, Novo Nordisk A/S, Danske Bank A/S, and Novozymes A/S. See Parks Decl. Exhibits B, C, D, E. All nine of the tax vouchers that MCM Ltd. prepared for the Plan state that the Plan is located at 61 Broadway, Suite 1915, New York, NY 10006. Parks Decl. ¶ 9.

ED&F Man Capital Markets, Ltd. Actively Served and Solicited the Goldstein Parties

The Goldstein Plan opened a brokerage account with MCM Ltd. in March 2012. The Custody Agreement between the parties provides that MCM Ltd. shall indemnify the Plan for losses caused by MCM Ltd.'s "own breach of duty" or "willful default, fraud, or negligence [. . .] in providing services" pursuant to the Agreement. Niven Decl. Ex. E § 13(a).

In all of the plan documents and contracts attached to MCM Ltd.'s counsel's declaration, the Plan stated that its address was 61 Broadway, Suite 1915, New York, NY 10006. Niven Decl. Ex. C, E, F. In response to MCM Ltd.'s request for payment instructions, the Plan provided a National Financial Services brokerage account held at J.P. Morgan Chase at One Chase Plaza, New York, NY 10005 (the "J.P. Morgan Account").

Over the next seven years, MCM Ltd., per the parties' agreement, withdrew from and deposited into the J.P. Morgan Account as necessary to fund the Plan's securities transactions and deposit trading gains. Parks Decl. ¶ 35.

LEGAL STANDARD

The Goldstein Parties need only prove a prima facie case to survive MCM Ltd.'s motion to dismiss for lack of personal jurisdiction. Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC, 366 F. Supp. 3d 516, 522 (S.D.N.Y. 2018). The Court may consider facts outside the pleadings, such as affidavits and supporting materials, to determine whether it has personal jurisdiction over a defendant. See, e.g., id.; In re Stillwater Capital Partners Inc. Litig., 851 F. Supp. 2d 556, 556–57 (S.D.N.Y. 2012). The Court must construe all inferences in favor of the Goldstein Parties. See Sonterra, 366 F. Supp. 3d at 522.

ARGUMENT

New York courts regularly exercise specific jurisdiction over "sophisticated institutional trader[s] knowingly entering our state—whether electronically or otherwise." Deutsche Bank Securities, Inc. v. Montana Bd. of Investments, 7 N.Y.3d 65, 72 (2006).

MCM Ltd. is the paradigmatic "sophisticated institutional trader" whose business relies upon and boasts of its access to New York markets. The Court should reject its motion to dismiss.

I. ED&F Man Capital Markets, Ltd.'s Purposeful Availment of the New York Market Establishes this Court's Jurisdiction

This Court can only exercise personal jurisdiction over MCM Ltd. if doing so would comport with (1) CPLR 302(a), New York's long-arm statute, and (2) Constitutional due process. Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 168 (2d Cir. 2013). Here, CPLR 302(a)(1) and CPLR 302(a)(3) provide two independent bases for exercising long-arm jurisdiction over MCM Ltd.

Regardless of whether MCM Ltd. is "essentially at home" in New York and thus subject to its general jurisdiction, see Brown v. Lockheed Martin Corp., 814 F.3d 619, 627 (2d Cir. 2016) (citing Daimler AG v. Bauman, 571 U.S. 117, 137 (2014)), MCM Ltd.'s purposeful availment of New York and its markets, including its contractual relationships with the Goldstein Parties and other New York citizens, subjects it to this Court's specific jurisdiction.

A. CPLR 302(a)(1) Authorizes Long-Arm Jurisdiction over ED&F Man Capital Markets, Ltd.

1. ED&F Man Capital Markets, Ltd. Transacts Business in New York

New York courts may exercise specific jurisdiction over a foreign entity that "transacts any business within the state or contracts anywhere to supply goods or services in the state." N.Y. C.P.L.R. § 302(a)(1) (McKinney 2019).[1] A foreign defendant transacts business in New York when, on its own initiative, the defendant "projects [itself] into this state to engage in a sustained and substantial transaction of business," i.e., "seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship." D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 298 (2017) (quoting Paterno v. Laser Spine Inst., 24 N.Y.3d 370, 377 (2014)).

So long as a plaintiff has alleged that use of the New York accounts was purposeful, and not merely "coincidental," specific jurisdiction is proper. Nike, Inc. v. Wu, 349 F. Supp. 3d 310, 324 (S.D.N.Y. 2018) (citing Licci v. Lebanese Canadian Bank, 20 N.Y.3d 327, 338 (2012) ("Licci III")); see also, e.g., Gucci America, Inc. v. Weixing Li, 135 F. Supp. 3d 87, 95 (S.D.N.Y. 2015) (denying motion to dismiss for lack of personal jurisdiction where judgment debtors "[could not] credibly compare [themselves] to a passive recipient of a few one-off wire transfers that by pure happenstance were routed

[1] The second clause of Section 302(a)(1) provides for jurisdiction where the defendant has only "minimal contacts" with New York but contracts to deliver goods or services to the state. Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 169 (2d Cir. 2010) (citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 789 (2d Cir. 1999); Island Wholesale Wood Supplies, Inc. v. Blanchard Indus., Inc., 101 A.D.2d 878, 880 (N.Y. App. Div. 1984)).

through a domestic correspondent bank account."). Whether the purchases and sales of the securities at issue occurred in the United States is irrelevant. Alibaba Grp. Holding Ltd. v. Alibabacoin Found., No. 18-cv-2897 (JPO), 2018 WL 5118638, at *3–4 (S.D.N.Y. Oct. 22, 2018) (Oetken, J.) (rejecting defendant's argument that purchases of virtual currency "did not occur in the United States' because they 'consist of ledger entries made in Minsk, Belarus'"). One single New York transaction can be sufficient to confer personal jurisdiction. C. Mahendra (N.Y.), LLC v. Nat'l Gold & Diamond Ctr., Inc., 125 A.D. 3d 454, 457 (App. Div. 2015).

Furthermore, the New York Court of Appeals continually reiterates that a defendant need never physically enter the state to be subject to "transacting business" jurisdiction. Deutsche Bank, 7 N.Y.3d at 71 (citations omitted). Indeed, the Court has repeatedly recognized CPLR 302(a)(1) jurisdiction over commercial actors and investors that use electronic communications to "project themselves into New York to conduct business transactions." Id. at 71; accord Warner Bros. Ent. Inc. v. Ideal World Direct, 516 F. Supp. 2d 261, 266 (S.D.N.Y. 2007) (holding that a website operator transacted business in New York under the long-arm statute by "transmit[ting] files to customers in exchange for membership fees"); Thomas Publ'g Co. v. Indus. Quick Search, Inc., 237 F. Supp. 2d 489, 491–92 (S.D.N.Y. 2002) (holding that a website operator transacted business in New York under the long-arm statute when it made an interactive directory of manufacturing and industrial companies available on its website); Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565–66 (S.D.N.Y. 2000) (holding that a website operator transacted business in New York under the long-arm statute when its website would permit a user to apply for a loan).

"[T]he selection and repeated use of New York's banking system" also "constitutes purposeful availment of the privilege of doing business in New York." Licci, 732 F.3d at 171 (quoting Bank Brussels Lambert, 305 F.3d at 127) (quotation marks omitted); accord Rusaid v. Pictet & Cie, 28 N.Y.3d 316, 326–27 (2016) ("Repeated, deliberate use" of a New York bank account "that is approved by the foreign bank on behalf of and for the benefit of a customer[] demonstrates volitional activity constituting transaction of business."). Thus, courts routinely find that financial institutions "transact business" in New York by using New York bank accounts, thereby showing "purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." Licci III, 20 N.Y.3d at 339 (quoting Indosuez Int'l Fin. v. Nat'l Reserve Bank, 98 N.Y.2d 238, 247 (2002)).

The Court of Appeals regularly holds that Section 302(a)(1) jurisdiction is proper where the defendant has an ongoing commercial relationship with a New York-based plaintiff. In Deutsche Bank, the Court held that it was proper to exercise jurisdiction over a "sophisticated institutional trader" that conducted nine bond trades with a New York branch of Deutsche Bank via phone and email over approximately 13 months. 7 N.Y.3d 65. In another case, the Court held that California defendants "transacted business" where they formed an attorney–client relationship with the plaintiff New York attorney through numerous telephone calls, faxes, mail contacts, and emails over approximately nine months. Fischbarg v. Doucet, 9 N.Y.3d 375, 380 (2007). Similarly, in Mahendra, the First Department reversed a dismissal for lack of personal jurisdiction where the California-based defendant had "placed numerous orders, totaling millions of dollars, by telephoning plaintiff [diamond wholesaler] in New York and negotiating terms of size, price range, and description of the diamonds," even though the parties' litigation concerned only two of those transactions. 125 A.D.3d at 454.

The New York Court of Appeals has even found transactions sufficient to confer jurisdiction where the contractual relationship was much briefer than those in Deutsche Bank, Fischbarg, and Mahendra. In a breach-of-contract case, the Court held that a defendant had "transacted business" in New York where he called the plaintiff auction house the day before an auction and requested that "telephonic communication be established" between him and the auction house during the bidding so he could participate in the live auction, and the plaintiff agreed and created an open telephone line for the defendant, through which he bought two paintings at the auction. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 15–16 (1970).

The linchpin of the analysis is the defendant's connection to the forum—not the defendant's connection to the plaintiff, or the plaintiff's connection to the forum. For example, in Queen Bee, the Second Circuit noted that the defendant not only had shipped an allegedly-counterfeit Chloe-brand bag to New York, but also (1) operated a website that offered Chloe bags for sale to New York consumers, (2) allowed New York consumers to purchase those bags, (3) facilitated the shipment of those bags into New

York, and (4) had shipped Chloe and other-branded merchandise to New York in at least 52 separate transactions. 616 F.3d at 166–67.

The Goldstein Parties' claim against MCM Ltd. is the quintessential Section 302(a)(1) claim. See Beacon Enter., Inc. v. Menzies, 715 F.2d 757, 764 (2d Cir. 1983) ("Section 302(a)(1) is typically invoked for a cause of action against a defendant who breaches a contract with plaintiff or commits a commercial tort against plaintiff in the course of transacting business or contracting to supply goods or services in New York."). The parties' contractual relationship began in March 2012 and did not end until 2019—long after SKAT sued both the Goldstein Parties and MCM Ltd., and longer than the relationships in Deutsche Bank, Fischbarg, and Mahendra. See Parks Decl. ¶ 8. MCM Ltd. knew that the Plan was a New York resident from the very beginning: the Plan account application, opening documents, and Custody Agreements attached to opposing counsel's declaration all state that the Plan's address is in Manhattan, at 61 Broadway. See Niven Decl. Ex. C, E, F.

Over the seven years that the account was open, MCM Ltd. provided millions of dollars of "customized equity finance solutions" to the Plan. Parks Decl. ¶ 9. And MCM Ltd. often solicited the Plan to engage in trades, including with regard to at least four of the Danish securities at issue in SKAT's Complaint: D/S Norden, Novozymes A/S, Danske Bank A/S, and Novo Nordisk A/S. Parks Decl. Ex. B, C, D, E.

Furthermore, MCM Ltd. did not require the Goldstein Parties to open an overseas bank account, but instead ran all deposits and withdrawals through a J.P. Morgan Chase account in Manhattan. See Niven Decl. Ex. C, Account Opening Documents p. 8. "It is of no moment" that the Goldstein Parties told MCM Ltd. which bank account to use, "because what matters is [MCM Ltd.'s] banking activity" with the J.P. Morgan account. Vasquez v. Hong Kong & Shanghai Banking Corp. Ltd., No. 18 Civ. 1876 (PAE), 2019 WL 237810, at *11 (S.D.N.Y. May 30, 2019), reconsideration denied, No. 18 Civ. 1876 (PAE), 2019 WL 3252907 (S.D.N.Y. July 19, 2019) (Engelmayer, J.) ("Our cases do not require that the foreign bank itself direct the deposits, only that the bank affirmatively act on them.").[2]

Like in Rusaid, "[p]resumably, using [the J.P. Morgan account] was cheaper and easier for [MCM Ltd.] than other options, and whatever financial and other benefits [MCM Ltd.] enjoyed as a result allowed [the brokerage] to maintain [the Goldstein Plan] as a customer." 28 N.Y.3d at 340; cf. Licci, 732 F.3d at 171 ("In light of the widespread acceptance and availability of U.S. currency, LCB could have, as it acknowledges, processed U.S.-dollar-denominated wire transfers for the Shahid account through correspondent accounts anywhere in the world)[,] but LCB deliberately chose to process the many Shahid wire transfers through AmEx in New York.").

[2] Because the parties contracted that MCM Ltd. could withdraw from and deposit directly into the J.P. Morgan Account, long-arm jurisdiction also is proper under CPLR 302(a)(1)'s "contracts anywhere" language. See, e.g., Mago Int'l LLC v. LHB AG, No. 13 Civ. 3370 CM, 2014 WL 2800751, at *4–5 (S.D.N.Y. June 18, 2014) (McMahon, J.) (denying motion to dismiss for lack of personal jurisdiction and *forum non conveniens*; "[t]he fact that [plaintiff] chose an advising bank which has its corporate offices in two other states does not alter the well-pleaded fact that [plaintiff's] account with the bank is in a New York branch of the bank—and that is where [plaintiff] would presumably have received payment."); Key Bank of N.Y., N.A. v. Patel, 796 F. Supp. 675, 676 (N.D.N.Y. 1992) (citing, inter alia, Chase Manhattan Servs. Corp. v. Nat'l Bus. Sys., Inc., 766 F. Supp. 203, 205 (S.D.N.Y. 1991) ("The rule that a guaranty to make payments to a New York **entity** constitutes a contract to provide services in New York pursuant to CPLR 302(a)(1) is so firmly entrenched in case law that it is hardly worth elucidation.").

But the Goldstein relationship was not MCM Ltd.'s only interaction with New York; the Brokerage's entire business model depends on its purposeful availment of New York. EDFMCM's website emphasizes it access to "all US equity and options markets"—which, of course, are centered here in New York City. Products & Services. EDFMCM also advertises that it has co-location facilities—essentially, on-site servers that facilitate fast trading—at NYMEX in Brookfield Place and ICE on Wall Street, each less than a mile from this Courthouse, and another at BrokerTec, across the Street from Bryant Park. Infrastructure & Technology. Without access to Manhattan, MCM Ltd. simply could not provide the "customized equity finance solutions" it boasts to all the world. Accord Nike, 349 F. Supp. 3d at 328 (holding that a bank's website advertisement of its U.S. dollar-clearing services helped show that it "transacted business" in New York).

There can be no question that MCM Ltd. transacted business in New York, "thus invoking the benefits and protections of its laws." D&R Global, 29 N.Y.3d at 298. MCM Ltd.'s very own exhibits and advertisements prove that it is so.

2. The Goldstein Parties' Claim is Related to ED&F Man Capital Markets, Ltd.'s Business Activity in New York

Section 302(a)(1) also requires that the Goldstein Parties' claims have an "articulable nexus" or "substantial relationship" with MCM Ltd.'s New York business transactions. D&R Global, 29 N.Y.3d at 298–99. However, the "arising from" prong of section 302(a)(1) does not require a causal link between the defendant's New York business activity and a plaintiff's injury; instead, the Goldstein Parties need only show a "'relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former.'" Licci, 732 F.3d at 168–69 (quoting Licci III, 20 N.Y.3d at 339)); see also Sole Resort, S.a. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 104 (2d Cir. 2006) (holding that long-arm nexus requirement is satisfied unless "the event giving rise to the plaintiff's injury had, at best, a tangential relationship to any contacts the defendant had with New York").

Like in Queen Bee, MCM Ltd.'s relationship with the Goldstein Parties is not merely a "one-off transaction, but rather part of a larger business plan purposefully directed at New York customers." 616 F.3d at 166–67. MCM Ltd. holds itself out as global brokerage firm equipped to trade securities all over the world; targets and services New York clients like the Goldstein Plan; and even created, solicited, and structured at least four of the transactions that gave rise to SKAT's claim against the Goldstein Parties.

Moreover, without U.S. pension plans, MCM Ltd. **could not** have engaged in the transactions that now—five years later—so concern SKAT. TPC ¶¶ 21, 65–68; see also, e.g., Double-Taxation Treaty. The transactions at issue in this case depend on the non-taxable status of U.S. pension plans like the Goldstein Plan. TPC ¶¶ 21, 65–68. MCM Ltd. built millions of dollars' worth of customized transactions for—and charged fees on and profited from—clients across the United States, including clients based in New York. Id. Without the Double-Taxation Treaty, there would have been no opportunity for MCM Ltd. to structure and promote the transactions. Id. MCM Ltd.'s purposeful availment of United States tax laws and New York markets and clients are directly related to the Goldstein Parties' claims against it.

MCM Ltd. further enriched itself via New York customers by soliciting pension plans like the Goldstein Plan to engage in the Danish transactions with funding from its affiliate, Volcafe, which seasonally amassed large quantities of cash. See Parks Decl. ¶¶ 15, 21, 22. By lending funds to the Goldstein Plan and other MCM Ltd. clients, MCM Ltd. and Volcafe were able to extract fees and other charges that amounted to interest rates materially higher than the historically-low rates of 2014 and 2015. Id. ¶¶ 14–15.

The Goldstein Parties have alleged that, to the extent that SKAT succeeds in holding them liable, MCM Ltd.—which solicited, structured, and facilitated at least four of the transactions at issue—is the truly responsible party. Of course the Goldstein Parties' claim is "related" to MCM Ltd.'s New York business activities. Accord Licci, 732 F.3d at 169 (holding that claims against foreign bank "arose out of" New York business because plaintiff alleged that the bank breached various statutory duties by using a New York correspondent account to funnel money to terrorist organizations).

B. CPLR 302(a)(3) Provides an Alternative Basis for Exercising Personal Jurisdiction over ED&F Man Capital Markets, Ltd.

Because the Custody Agreement explicitly contemplates that torts—namely, fraud and negligence—could constitute breaches of the Custody Agreement, Section 302(a)(3) provides another basis to exercise long-arm jurisdiction over MCM Ltd. See Custody Agreement § 13(a). Section 302(a)(3) allows New York courts to exercise jurisdiction over a foreign defendant that commits a tortious act outside the state "causing injury to person or property within the state," if the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." N.Y. C.P.L.R. § 302(a)(3) (McKinney 2019).

Unlike Section 302(a)(1), Section 302(a)(3) requires that the effect of the tort be felt in New York. See, e.g., Cavalier Label Co. v. Polytam, Ltd., 687 F. Supp. 872, 879 (S.D.N.Y. 1988) (holding that although defendant allegedly made misrepresentations in Israel and Italy, plaintiff adequately alleged injury by asserting the loss of New York customers); Cleopatra Kohlique, Inc. v. New High Glass, Inc., 652 F. Supp. 1254, 1265 (E.D.N.Y. 1987) (holding that misrepresentations made by defendant in Italy, relied upon a New York corporation to buy mascara products, caused injury in New York); Sybron Corp. v. Wetzel, 46 N.Y.2d 197, 203–04 (1978) (holding that French corporation's inducement of New Jersey citizen's breach of trade secrets agreement would cause injury by diminishing New York customer base). The "critical question" is "where the first effect of the tort was located that ultimately produced the final economic injury." Bank Brussels Lambert, 171 F.3d at 792.

New York courts regularly hold that the domestic injury requirement is satisfied where out-of-state fraud or tortious misrepresentations affect New York bank accounts. See, e.g., id. (holding that disbursement of funds in a New York bank account was the relevant event); Hargrave v. Oki Nursery, 636 F.2d 897, 900 (2d Cir. 1980) ("One immediate and direct 'injury' Oki's alleged tortious misrepresentations caused to plaintiffs was the loss of money paid by them for the diseased vines"); Marine Midland

Bank v. Keplinger & Assocs., Inc., 488 F. Supp. 699, 703 (S.D.N.Y. 1980) ("[S]ince all disbursements to ADDM or its creditors were made by MMB in New York, the situs of the injury was in New York"); cf. Polish v. Threshold Tech., Inc., 72 Misc. 2d 610 (Sup. Ct. 1972) (finding jurisdiction under § 302(a)(2) over defendant who sent letter containing affirmative misrepresentation into New York because plaintiff perused fraudulent letter in the state and parted with stock certificates there in reliance on the letter).

Here, the Goldstein Parties essentially allege that they did not defraud or otherwise behave improperly toward SKAT, but that if their Reclaim Applications were, indeed, fraudulent or otherwise improper, MCM Ltd.—which executed all of the trades at issue and prepared the tax vouchers necessary to the Reclaim Applications—must be liable for defrauding both SKAT and the Goldstein Parties. Amended Answer ¶ 90. Had the Plan ever suspected that MCM Ltd. was behaving improperly, it would not have allowed MCM Ltd. access to its J.P. Morgan accounts, and would have instead shuttered its brokerage account immediately and ended its contractual relationship with MCM Ltd.

Under all possible scenarios, the Plan—known to MCM Ltd. to be a citizen of New York, with a bank account in New York—would have been injured in New York. Therefore, CPLR 302(a)(3) provides an alternate basis for exercising long-arm jurisdiction over MCM Ltd.

C. Exercising Personal Jurisdiction over ED&F Man Capital Markets, Ltd. Comports with Due Process

Exercising specific jurisdiction also must comport with Constitutional due process, which requires that (1) the defendant have "minimum contacts" with the forum such that it should "reasonably anticipate being haled into court there" and (2) defending the suit in New York would comport with "traditional notions of fair play and substantial justice." Walden v. Fiore, 571 U.S. 277, 283 (2014) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Despite MCM Ltd.'s implication to the contrary, see Mot. at 14, "[r]egardless of where a plaintiff lives or works, an injury is only jurisdictionally relevant insofar as it shows that the defendant has formed a contact with the forum State." Walden, 517 U.S. at 290 ("The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."). However, the defendant's relationship with a plaintiff resident "may be intertwined with" his contacts with the forum state. Walden, 571 U.S. at 284–85.

While Section 302(a)(1) "may theoretically be prohibited under due process analysis," undersigned counsel is unaware of a single case in which Section 302(a)(1) jurisdiction existed but its exercise was unconstitutional. Accord Licci, 732 F.3d at 170. CPLR 302(a)(3)'s "regularly does or solicits business [. . .] in the state" requirement is similarly tethered to Constitutional standards. See Newmont Mining Corp. v. AngloGold Ashanti Ltd., 344 F. Supp. 3d 724, 742–43 (S.D.N.Y. 2018) ("Given the striking similarity between" the due process and CPLR 302(a) standards, "it would be unusual indeed" for CPLR 302(a) jurisdiction to violate due process).

There is no doubt that exercising specific jurisdiction over MCM Ltd.—a sophisticated, multi-billion brokerage whose business demands full access to Wall Street—comports with due process. MCM Ltd.'s "principal reason for being" requires providing its international customers unfettered access to New York's markets, including NYMEX on Brookfield Place, ICE on Wall Street, and BrokerTec on 42nd Street. See Deutsche Bank, 7 N.Y.3d at 72 (quoting 21 A.D.3d 90, 95 (2005)). Like in Deutsche Bank, MCM Ltd. has knowingly initiated and pursued contracts and negotiations not only with the Goldstein Parties, but presumably, at a minimum, thousands of other New Yorkers each year. It is safe to assume that MCM Ltd.'s $8.1 billion annual revenue, derived from fees and commissions, is only a fraction of what it funnels through New York markets each year.

1. ED&F Man Capital Markets, Ltd. Has Extensive Contacts with New York

The "minimum contacts" analysis focuses on "the relationship among the defendant, the forum, and the litigation" and consequently "must arise out of contacts that the defendant **himself** creates with the forum." Walden, 571 U.S. at 283–84 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984)); id. (emphasis in original) (citing Burger King, 471 U.S. at 475; Int'l Shoe, at 391)). To determine the strength of a defendant's contacts under Section 302(a)(1) or the Due Process Clause, Second Circuit courts consider the totality of the defendant's contacts with the forum. Queen Bee, 616 F.3d at 163–64 (citations and quotations omitted).

Therefore, the Supreme Court has affirmed specific jurisdiction over defendants who have purposefully "reach[ed] out beyond" their home and into another state by entering into a contractual relationship that "envisioned continuing and wide-reaching contacts" in the forum. Burger King, at 479–80. The Court also affirmed jurisdiction where a defendant circulated magazines to "deliberately exploit[]" a market in the forum. Keeton, at 781.

MCM Ltd. has "target[ed]" and "concentrate[d] on" New York; its fundamental business requires "invok[ing]" and "benefit[ing] from" the protection of New York laws. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885–87 (2011). MCM Ltd.'s contacts with New York are not "random, fortuitous, or attenuated." See Walden, 571 U.S. at 286. Instead, MCM Ltd.—through its own regular, sustained business activities—has purposefully established connections with New York. See id.

2. It is Reasonable to Hale ED&F Capital Markets, Ltd. Into New York Courts

If minimum contacts exist, the burden shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 217–18 (2000); accord State Farm Fire & Cas. Co. v. Swizz Style, Inc., 246 F. Supp. 3d 880, 893 (S.D.N.Y. 2017), mot. to certify denied, No. 15 Civ. 9432 (NSR), 2017 WL 3835694 (S.D.N.Y. Aug. 31, 2017) (Román, J.) . The Supreme Court has set forth five relevant factors: the (1) burden on the defendant, (2) interests of the forum state, (3) plaintiff's interest in obtaining relief, (4) interstate judicial system's interest in obtaining the most efficient resolution of controversies, and

(5) shared interest of several states in furthering substantive social policies. Asahi Metal Indus Co. v. Superior Court of California, Solano Cty., 480 U.S. 102, 113 (1987). "The reasonableness of jurisdiction is inversely proportional to the minimum contacts present." State Farm, 246 F. Supp. 3d at 893 (citing Burger King, 471 U.S. at 477 ("[Reasonableness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.").

"In this modern era, the [defendant-burden] prong is largely disregarded with respect to solvent corporate defendants. And it is hard to imagine that a corporation with distributors in every country across the globe would be heavily burdened by travel or translation costs." State Farm, 246 F. Supp. 3d at 893; see also, e.g., Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244–45 (2d Cir. 1999) (As Japanese defendant "would be subject to jurisdiction if an indemnification action had been filed in the eastern District of Pennsylvania (where [plaintiff] resides), this factor alone, while it weighs in [defendant's] favor, cannot overcome [plaintiff's] threshold showing of minimum contacts").

MCM Ltd. cannot show that "compelling" circumstances warrant dismissal of this American action. While requiring an MCM Ltd. representative to travel to New York for trial may present some burden, it would be far more difficult for 81-old Mr. Goldstein to travel to London and navigate its legal system than it would be for MCM Ltd. to litigate in the Southern District, where it already has counsel on retainer. Cf. Bank Brussels Lambert, 305 F.3d at 129–30 ("Even if forcing the defendant to litigate in a forum relatively distant from its home base were found to be a burden, the argument would provide defendant only weak support"); see also, e.g., State Farm, 246 F Supp. 3d at 893 (while forcing Japanese manufacturer to defendant in New York may impose a "substantial burden," "the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago").

Because New York has a "manifest interest in providing effective means of redress for its residents," the second factor also favors the Goldstein Parties. See Burger King, 471 U.S. at 483 (quotation marks omitted). Indeed, New York has an interest in protecting its citizens even where they merely seek indemnification. For example, in State Farm, a property insurer sued a New York distributor of allegedly-defective air purifiers manufactured by a Swiss corporation. 246 F. Supp. 3d at 880. The distributor filed a third-party complaint against the Swiss corporation, essentially seeking indemnification, and the Swiss manufacturer moved to dismiss. Id. Judge Román held that the court had specific jurisdiction over the manufacturer, noting that New York "surely would not welcome" the possibility of the "distributor [being] held liable without effective recourse against the manufacturer of the item." Id. at 893. Allowing the foreign third-party defendant to become "effectively judgment-proof" would undermine New York's interests, particularly in safeguarding its citizens. Id.

The third factor also favors the Goldstein Parties, who not only have significantly fewer resources to litigate than MCM Ltd. does, but also would be severely prejudiced by the English's system's paucity of discovery practices. See, e.g., Gavin Foggo and Caroline Benham, Commercial Litigation in the United Kingdom, American Bar Association (Dec. 22, 2011), https://bit.ly/2NHbZmt. This discovery asymmetry would be particularly prejudicial because SKAT would continue to have full access to American discovery practices while the Goldstein Parties attempt to seek indemnification from MCM Ltd. with one hand tied behind their backs.

Finally, because this case does not involve parties based in different United States jurisdictions, the fourth and fifth factors are not relevant here.

MCM Ltd.'s "generalized complaints of inconvenience arising from having to defend [itself] from suit in New York do not add up to a 'compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" Queen Bee, 616 F.3d at 173 (quoting Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)). Asserting jurisdiction over MCM Ltd. satisfies due process.[3]

II. MCM Ltd. Falls Far Short of Establishing the Rare Circumstances That Warrant *Forum non Conveniens* Dismissal

The "ultimate inquiry" of the *forum non conveniens* analysis is "where trial will best serve the convenience of the parties and the ends of justice." Koster v. (Am.) Lumbermans Mut. Cas. Co., 330 U.S. 518, 527 (1947). Because ED&F Man cannot establish that proceeding in this Court "[would] establish oppressiveness and vexation to [itself] out of all proportion to [the Goldstein Parties'] convenience" or that this Court "is inappropriate because of considerations affecting the [C]ourt's own administrative and legal problems," this Court must reject MCM Ltd.'s Motion. See Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 146 (2d Cir. 2000) (quoting Piper Aircraft Co. v. Reyno, 454

[3] If MCM Ltd. raises sufficient facts on reply to challenge the Goldstein Parties' prima facie showing, the Court should order jurisdictional discovery. Accord Vasquez, 2019 WL 2327810, at *6.

U.S. 235, 255 & n.3 (1981)); see also Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947), superseded by Louisiana statute as stated in Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) ("the plaintiff's choice of forum should rarely be disturbed," "unless the balance [of factors] is strongly in favor of the defendant."); Koster, 330 U.S. 518, 524 (1947) (a plaintiff "should not be deprived of the presumed advantages of its home jurisdiction").

Unsurprisingly, MCM Ltd. musters no authority to support its argument that the Goldstein Parties' decision to name MCM Ltd. a third-party defendant is entitled to less deference simply because SKAT initiated the litigation. See Mot. at 19–20. The implication is particularly improper because in a *forum non conveniens* case involving a foreign court, the "'home forum' for a plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." Guidi, 224 F.3d at 146 n.4.

Moreover, the language that MCM Ltd. misrepresents as a "forum selection clause," see, e.g., Mot. at 4–5, 13 n.8, 17, 19–20, merely states that English courts "have non-exclusive jurisdiction" to settle contractual disputes. Custody Agreement § 22(d). Furthermore, the same clause explicitly provides that:

> The parties to this Agreement shall not be prevented from taking proceedings related to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the parties may take concurrent proceedings in any number of jurisdictions.

Id. § 22(d).

That said, forum selection clauses are largely irrelevant to the issue of personal jurisdiction. Compare Mot. at 13 n.8 (quoting Longo v. FlightSafety Int'l, Inc., 1 F. Supp. 3d 63, 67 (E.D.N.Y. 2014)) (arguing that a foreign forum selection clause "weighs against

New York's exercise of long-arm jurisdiction under CPLR § 302) and Longo, 1 F. Supp. at 67 (quoting Atl. Marine Constr. Co. v. United States Dist. Court for the Western Dist. of Texas, et al., 571 U.S. 49, 60–61 (2013)) (foreign forum selection clauses are relevant to a *forum non conveniens* analysis, not a Rule 12(b) motion).

But even assuming the purported "forum selection clause" were relevant, here, the Custody's Agreement election of "non-exclusive jurisdiction" and explicit preservation of the parties' foreign litigation rights shows that MCM Ltd., which drafted that Agreement with the New York-based plan, understands and agrees that litigating in this Court is an entirely fair burden for the multi-billion brokerage. Accord Custody Agreement § 22. The parties may not have anticipated a multi-jurisdictional lawsuit in which a foreign tax authority would attempt to sue both MCM Ltd. and the Plan wherever they could find them, but the Agreement certainly contemplated the possibility. See Custody Agreement § 22(d) (allowing concurrent proceedings in multiple jurisdictions).

Furthermore, unlike analyses regarding transfer of cases among federal courts, the existence of related foreign litigation neither is a relevant factor in the Supreme Court's *forum non conveniens* analysis nor has been considered significant enough to outweigh plaintiffs' forum choices. Guidi, 224 F.3d at 148 (citing Piper Aircraft, 454 U.S. at 253–54; Nalls v. Rolls-Royce Ltd., 702 F.2d 255 (D.C. Cir. 1983); Gulf Oil, 330 U.S. at 508–09. The Goldstein Parties, of course, have no power over SKAT's decisions to file lawsuits; the fact that SKAT initiated litigation against MCM Ltd. in England is irrelevant to whether

New York courts can require MCM Ltd. to indemnify the Goldstein Parties. Contra Mot. at 19–21.

Like in Guidi, here, the Goldstein Parties are "ordinary American citizens for whom litigating in [England] presents an obvious and significant inconvenience." Conversely, MCM Ltd. is a sophisticated, wealthy corporation "doing business abroad [that] can expect to litigate in foreign courts," being sued for a "relatively simple" claim. See Guidi, 224 F.3d at 147.

III. There is No Basis to Stay the Third-Party Claims

The Court should not issue a stay of the third-party complaint pending resolution of the English action.

SKAT's claims against the Goldstein Parties necessarily involve different facts and defenses than SKAT's English lawsuit against MCM Ltd. As MCM Ltd. recognizes and argues, in England, SKAT has asserted that MCM is a "non-fraud" defendant. In other words, SKAT's English position is exactly the opposite of the Goldstein Parties' theory: that if there is any fraud here, MCM Ltd. must have defrauded both SKAT and the Goldstein Parties by wrongfully representing that the Plan had engaged in the transactions at issue and paid the dividends that gave rise to the nine Reclaim Applications. SKAT's and the Goldstein Parties' theories are so different that there is no reason to assume that the English Action would resolve the Goldstein Parties' issues with MCM Ltd.

Furthermore, there is no indication that issuing a stay would promote judicial efficiency. Unlike in Evergreen Marine, staying this case would not allow the consolidation of all issues and parties in the English court; the Goldstein Parties are not involved in any English litigation. See Mot. at 23 (citing Evergreen Marine Corp. v. Welgrow Int'l Inc., 954 F. Supp. 101, 104 (S.D.N.Y. 1997)). Moreover, arguing that MCM Ltd.'s liability cannot be determined before the Goldstein Parties' puts the cart before the horse: the Goldstein Parties' theory is that if something improper has transpired, MCM Ltd. is the **only** liable party, not that they and MCM Ltd. would be joint-and-severally liable. See id. at 23-24.

Finally, it is absurd to claim that English discovery would be more beneficial for the Goldstein Parties. See Mot. at 24. As discussed supra, English discovery is significantly more limited than American discovery; reliance on the former would severely prejudice the Goldstein Parties' ability to defend themselves in this American court. See supra § I(C)(2). Furthermore, unlike American dockets, the English Action's filings are not public or readily-available to the Goldstein Parties, who must rely on the kindness of strangers for any crumbs that might break off of the English Action. See, e.g., Oliver Cain and Nicholas Dawson, Litigation and Enforcement in the UK (England and Wales), Practical Law (Oct. 1, 2018).

There is no reason to grant MCM Ltd. the impunity inherent in a stay of this American litigation.

CONCLUSION

For the foregoing reasons, the Goldstein Parties respectfully request that the Court deny MCM Ltd.'s motion in its entirety. In the alternative, the Court should allow the Goldstein Parties to take jurisdictional discovery or leave to amend their third-party complaint.

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